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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-6876

TOMMY NOELL,

Petitioner,

-v.-

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

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INDEX

	Page
Citation to Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	5
How the Federal Questions Were Raised and Decided Below	14
Reasons for Granting the Writ	
I. The Court Should Grant Certiorari to Consider Whether the Imposition and Carrying Out of the Sentence of Death for the Crime of Rape Under the Law of North Carolina Violates the Eighth or Fourteenth Amendment to the Constitution of the United States	18
II. The Court Should Grant Certiorari to Consider Whether the Exclusion for Cause of Ten Veniremen on the Grounds of Their Expressed Attitudes Toward the Death Penalty Violated Petitioner's Rights Under the Sixth or Fourteenth Amendment to the Constitution of the United States	23
A. The Test of Exclusion Applied by The Court Below Did Not Meet the Minimum Standards Required by The Constitution As Construed in Witherspoon v. Illinois, 391 U.S. 510 (1968)	23
B. The Exclusion of Veniremen with Conscientious Scruples Against Capital Punishment Deprived Petitioner of His Sixth Amendment Right to A Representative Jury	28
III. The Court Should Grant Certiorari to Consider Whether Petitioner's Rights Guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States Were Violated by the Calculated Misconduct of the Prosecutor in: (a) Impermissibly Suggesting Through Examination of a Prosecution Witness that Evidence, Never in Fact Produced and Not	

Page

Subject to Cross Examination, Bolstered the Prosecution's Case; and (b) Eliciting from the White Wife of A Black Defendant Charged with Interracial Rape the Fact that the Defendant's Child Had Been Conceived Prior to Their Marriage 33

IV. The Court Should Grant Certiorari to Consider Whether Petitioner Was Denied the Fundamental Fairness in Criminal Prosecutions Guaranteed by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States When the Police Failed Adequately to Investigate the Crime for Which Petitioner Was Convicted 37

V. The Court Should Grant Certiorari to Consider Whether the Process of Selecting Petitioner's Trial Jury in an Interracial Rape Case Denied Petitioner's Rights Guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States When: (a) The Trial Court Denied Petitioner's Challenge For Cause to a White Veniremen Who Expressed "Feelings Against Interracial Marriage" In a Case Where the Black Petitioner and his White Wife Both Testified; (b) The Trial Court Denied Petitioner's Challenge For Cause to a White Veniremen Who States He Was "Not Sure" Whether he Would Vote to Acquit if He Had Only a Reasonable Doubt of Petitioner's Guilt; and (c) Otherwise Eligible Black Veniremen Were Swept From the Jury Through the Interaction of Prosecutorial Challenges For Cause On The Ground of Conscientious Scruples Against Capital Punishment and the Prosecutor's Exercise of his Peremptory Challenges 41

Conclusion 46

TABLE OF CASES

Page

Alcorta v. Texas, 355 U.S. 28 (1957) 39

Apodaca v. Oregon, 406 U.S. 404 (1972) 29,30

Barber v. Page, 390 U.S. 719 (1968) 36

Berger v. United States, 295 U.S. 78 (1935) 35,40

Boulden v. Holman, 394 U.S. 478 (1968) 23,25,28

Brady v. Maryland, 373 U.S. 83 (1963) 39

Brown v. Allen, 344 U.S. 443 (1953) 28

Bumper v. North Carolina, 391 U.S. 543 (1968) 6

Carter v. Greene County Jury Comm'n, 396 U.S. 320 (1970) 28

Chambers v. Mississippi, 410 U.S. 284 (1973) 45

City of Tacoma v. Heater, 67 Wash.2d 733, 409 P.2d 867 (1966) 39

Cool v. United States, 409 U.S. 100 (1972) 44

DeStefano v. Woods, 392 U.S. 631 (1968) 28

Dillard v. North Carolina, No. 73- (O.T. 1973) 18,31

Douglas v. Alabama, 380 U.S. 415 (1965) 36

Duncan v. Louisiana, 319 U.S. 145 (1968) 28,30,31

Furman v. Georgia, 408 U.S. 238 (1972)..... 18,21,22

Giglio v. United States, 405 U.S. 150 (1972) 35

Giles v. Maryland, 386 U.S. 66 (1967) 37

Ham v. South Carolina, 409 U.S. 524 (1973) 36,41,44

Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied, ___ U.S. ___, 39 L.Ed.2d 881 (1974) 19

Hernandez v. Texas, 347 U.S. 475 (1954) 28,30

In re Hillery, 79 Cal. Rptr. 773, 457 P.2d 656 (Sup. Ct. 1969) 25

In re Martin, 58 Cal.2d 509, 24 Cal. Rptr. 833, 374 P.2d 801 (1962) 39

Cases (cont'd) Page

In re Winship, 397 U.S. 358 (1970) 44

Ivan v. City of New York, 407 U.S. 203 (1972) 44

Kyle v. United States, 297 F.2d 507 (2d Cir. 1961) 35

Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966), cert. denied, 386 U.S. 991 (1967) 29

Ladetto v. Massachusetts, 403 U.S. 947 (1971), rev'g 254 N.E.2d 415 (1969) 25

Lovely v. United States, 169 F.2d 386 (4th Cir. 1948) . 36

Marion v. Beto, 434 F.2d 29 (5th Cir. 1970) 25

Maxwell v. Bishop, 398 U.S. 262 (1969) 23,28

Michelson v. United States, 335 U.S. 469 (1948) 36

Miller v. Pate, 386 U.S. 1 (1967) 39

Mooney v. Holohan, 294 U.S. 103 (1935) 39

Napue v. Illinois, 360 U.S. 264 (1959) 39

O'Neil v. Vermont, 144 U.S. 323 (1892) 19

People v. Schader, 80 Cal.Rptr. 1, 457 P.2d 841 (Sup. Ct. 1969) 25

Peters v. Kiff, 407 U.S. 493 (1972) 41

Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970), cert. denied, 408 U.S. 942 (1972) 19

Roberts v. Russell, 392 U.S. 293 (1968) 40

Santobello v. New York, 404 U.S. 257 (1971) 35

Segura v. Patterson, 403 U.S. 946 (1971), rev'd, 402 F.2d 246 (10th Cir. 1968) 25

Smith v. Texas, 311 U.S. 128 (1940) 28

State v. Britt, N.C. Sup. Ct. No. 36 (May 15, 1974).... 31

State v. Robinson, 9 N.C. App. 433, 176 S.E.2d 253 (1970) 34

State v. Schowgurow, 240 Md. 121, 213 A.2d 475 (1965) . 30

State v. Selman, La. Sup. Ct. No. 54376 (June 10, 1974) 21

Cases (cont'd) Page

State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973) 3,5,20, 22,26,31

Swain v. Alabama, 380 U.S. 202 (1965) 41

Trop v. Dulles, 356 U.S. 86 (1958) 31

Wardius v. Oregon, 412 U.S. 470 (1973) 37,40

Weems v. United States, 217 U.S. 349 (1910) 19

White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) 29

Williams v. Florida, 399 U.S. 78 (1970) 29

Winston v. Commonwealth, 188 Va. 386, 49 S.E.2d 611 (1948) 39

Witherspoon v. Illinois, 391 U.S. 510 (1968) .. 15,23,24,25, 27,28,30,31

Woodards v. Maxwell, 303 F. Supp. 690 (S.D. Ohio 1969) 25

STATUTES

18 U.S.C. § 2031 (1971) 21

28 U.S.C. & 1257(3) 1

Ala. Code, tit. 14, § 395 (1958) 21

Ark. Stat. Ann. § 41-3403 (Supp. 1969) 21

Fla. Stat. Ann. § 794.01 (1965) 21

Fla. Stat. Ann. § 921.141 (1972) 22

Ga. Code Ann. § 26-2001 (1969) 21

Ga. Code Ann. § 27-2534.1 (1973) 21

Ky. Rev. Stat. Ann. § 435.090 (1969) 21

La. Code of Crim. Proc., Art. 817 (1971) 21

La. Rev. Stat. Ann. § 14:42 (1950) 21

Md. Code Ann., Art. 27, § 461 (Repl. vol. 1967) 21

Miss. Code Ann. § 2358 (Recomp. vol. 1956) 21

Statutes (cont'd) Page

Vernon's Ann. Mo. Stat. § 559.260 (1953) 21

Nev. Stat. §§ 200.363, 200.400 (1968) 21

N.C. Gen. Stat. § 14-21 (1958) 3,5,21

N.C. Gen. Stat. § 14-184 34

N.C. Gen. Stat. § 15-187 4

N.C. Gen. Stat. § 15-188 4

Okla. Stat. Ann. § 1115 (Supp. 1970) 21

S.C. Code Ann. § 16-72 (1962) 21

Tenn. Code Ann. § 39-2402 21

Tenn. Code Ann. § 39-3702 (1955) 21

Vernon's Tex. Pen. Code Ann., art. 1189 (1961) 21

Va. Code Ann. § 18.1-44 (1960) 21

OTHER AUTHORITIES

Bronson, "On the Conviction Proneness and Representativeness of the Death-Qualified Jury; An Empirical Study of Colorado Veniremen," 42 U. COL. REV. 1 (1970) 30

International Review on Public Opinion, Vol. II, No. 3 (1967) 30

MAGNA CARTA, Ch. 20-22, printed in ADAMS & STEPHENS, SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY (1926) 19

Packer, Making the Punishment Fit the Crime, 77 HARV. L. REV. (1964) 20

UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968) 20

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No.

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STATE OF NORTH CAROLINA,

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered on February 25, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at 284 N.C. 670, 202 S.E.2d 750 (1974), and is set out in Appendix A hereto, pp. 1a-21a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of North Carolina was entered on February 25, 1974 and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of rape under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether the exclusion for cause of ten veniremen on the grounds of their expressed attitudes toward the death penalty violated petitioner's rights under the Sixth or Fourteenth Amendment to the Constitution of the United States?

3. Whether petitioner's rights guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States were violated by the calculated misconduct of the prosecutor in: (a) impermissibly suggesting through examination of a prosecution witness that evidence, never in fact produced and not subject to cross examination, bolstered the prosecution's case; and (b) eliciting from the white wife of a black defendant charged with interracial rape the fact that the defendant's child had been conceived prior to their marriage?

4. Whether petitioner was denied the fundamental fairness in criminal prosecutions guaranteed by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States when the police failed adequately to investigate the crime for which petitioner was convicted?

5. Whether the process of selecting petitioner's trial jury in an interracial rape case denied petitioner's rights guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States when: (a) the trial court denied petitioner's challenge for cause to a white venireman who expressed "feelings against interracial marriage" in a case where the black petitioner and his white wife both testified; (b) the trial court denied petitioner's challenge for cause to a white venireman who stated he was "not sure" whether he would vote to acquit if he had only a reasonable doubt of petitioner's guilt; and (c) otherwise eligible black veniremen were swept from the jury through the interaction of prosecutorial challenges for cause on the ground of conscientious scruples against capital punishment and the prosecutor's exercise of his peremptory challenges?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> § 14-21. Punishment for rape.-Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.1/

1/ As construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

§ 15-187. Death by administration of lethal gas. - Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor.

§ 15-188. Manner and place of execution. - The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article.

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of North Carolina, entered on February 25, 1974, affirming petitioner's conviction and death sentence. Petitioner, Tommy Noell, a black man, was sentenced to die on August 3, 1973, in the Orange County Superior Court of North Carolina upon conviction for the rape of Miss Linda DiCenzo.[2/]

The State's evidence against petitioner consisted largely of Miss DiCenzo's testimony. She testified that at 8:45 a.m. on May 23, 1973, she had completed the night shift and had signed out from her nursing job at North Carolina Memorial Hospital in Chapel Hill, North Carolina, and had started to drive to her home in Carrboro, North Carolina. On the Route 54 by-pass, petitioner passed her in "a small compact, light

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2/ Petitioner's sentence of death was imposed under N.C. Gen. Stat. §14-21 (rape) as construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). The North Carolina Legislature enacted a statute, S.B. 157, Chap. 1201, 1973 Sess. (2nd Session, 1974) on April 8, 1974 which imposes the death penalty for certain rapes, but this statute was enacted subsequent to the decision of the North Carolina Supreme Court in petitioner's case and provides that it is applicable to offenses committed after its ratification. Under the new law, the crime for which petitioner was convicted would not appear to qualify as the capital offense of "first degree rape," since no "deadly weapon" was used and since the victim was over the age of twelve and did not sustain "serious bodily injury." Sec. 3 of S.B. 157, supra, amending N.C. Gen. Stat. §14-21.

green with a stripe on the side and [a] . . . green vinyl [top]."[3] R. 32. Petitioner pulled into her apartment complex, the Royal Park Apartments, and stopped along the driveway curb. Miss DiCenzo passed him, viewing him for "2-3 seconds." R. 36. She parked and climbed the stairs to her third floor apartment; as she was unlocking the door, at 9:05 a.m., she saw petitioner's car slowly passing below and, "for no longer than three seconds," R. 36, observed petitioner looking up at her.

A few minutes after she had entered her apartment, she heard a knock at the door and said, "come in." R. 32. She testified:

> "[Petitioner] came in and said he was selling vacuum cleaners. [He was wearing "light green slacks and a sort of burgundy top, with stripes in it." R. 34]. I told him I did not want one and that he should talk to my roommate who was away at work and would return about 6:00 p.m.
>
> [Petitioner][4] turned to go but locked the door when he got to it. He turned around and walked towards me and said, 'Miss, I'm going to fuck you' and I thought it was all a joke.
>
> I said 'You must be kidding,' but he grabbed my shoulder and said, 'We're going to fuck right now or I'm going to kill you.'" R. 32.

3/ In North Carolina, the certified appellate record does not consist of a direct transcript of what was said in the trial court, but rather a "narrated" account which transforms question-and-answer dialogue into monologue. See Bumper v. North Carolina, 391 U.S. 543, 546, n. 8 (1968).

4/ On cross examination, Miss DiCenzo stated: "When the attacker came to my door I didn't make a mental note that he was the same person driving the automobile in the lot. When I thought about it later, the face of the man I saw and the face of the man in my apartment, I thought it was the same. I'll say I know it was the same man. I don't know what the man in the car was wearing." R. 37.

Miss DiCenzo testified that petitioner pulled her onto the couch and, as she screamed, clamped his hand over her mouth; that he choked her, repeating that he would kill her unless she submitted; that he then pulled her into the bedroom and ordered her to take off her uniform; and that when she refused, he began choking her again, and finally succeeded in taking off her clothes. She testified that she told him she "didn't want to get pregnant" and that he replied "you won't get pregnant, that's why girls don't like me." R. 33. Miss DiCenzo testified that petitioner had intercourse with her, and continued choking her as she fought him. She testified that she blacked out "twice that I know of; maybe three times," R. 34, and that finally "I heard this voice way off in the blackness saying, lady, I'm going to let you live, because I love life and I know you do, and that was it. I don't remember -- I didn't hear him leave or anything." R. 34. She testified that she sustained bruises on her back and arms, and abrasions on her face, and that her eyes were blood-shot as a result of her struggle. R. 35. Miss DiCenzo made a "positive," R. 34, courtroom identification of petitioner as her assailant, stating that this identification was "based on seeing him in my apartment on May 23, 1973." Ibid.

Miss DiCenzo testified that as soon as she regained consciousness, she called the police. Carrboro policeman Kenneth Horne testified that he received her call at 9:39 a.m. and entered her apartment at 9:42 a.m. Miss DiCenzo told him

she had been raped,[5] and he observed that the apartment was generally orderly, but that the bedroom was "disarranged." Ibid. Officer Horne discovered a wrist watch with a broken band lying on the floor of the apartment's dining area which Miss DiCenzo could not identify and which she did not think was there before the attack. The watch was introduced as evidence.

The police arrested petitioner at approximately 5:30 p.m., May 23, 1973, at his brother's trailer in Chatham County, North Carolina, pursuant to a warrant for his arrest signed by Miss DiCenzo[6] charging him with rape. Petitioner was advised of his "constitutional rights," R. 46; his hands were handcuffed behind his back; and he was transported to the Carrboro Police Station, about eight miles away. At the Station, he was again

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5/ Two witnesses testified that on the morning of the attack, Miss DiCenzo had given them an account of the rape similar to her testimony in court: Officer Horne, R. 40-42; North Carolina Memorial Hospital emergency room nurse Mary Ford, R. 42-44.

6/ The record does not reveal the circumstances which caused the police to arrest petitioner. Carrboro Police Department Detective John Blackwood testified that he interviewed Miss DiCenzo twice on May 23, 1973, and that "as a result of that [second] conversation [at the Carrboro Police Station], and what transpired there" a warrant for petitioner's arrest was sworn out. R. 45.

advised of his "rights," R. 47, and asserted that he didn't think he needed a lawyer, but he "wanted to know what was going on." Ibid. Upon being told he was charged with rape, "he said he didn't know anything about it." Ibid. He stated that he owned a watch, but that he had lost it "a couple of weeks before," ibid., and that he had been driving his mother's 1971 Maverick compact earlier that day, which was "[t]wo-tone green, black top, with a black stripe on it." R. 48. Detective Blackwood also testified that as petitioner was being examined, at approximately "5:30 or 6:00" p.m., R. 39, at least eight hours after the rape of Miss DiCenzo, he observed "a visible impression of what was left by an expandable watch band" on petitioner's left wrist. R. 52. The police did not attempt to photograph this impression, and they did not attempt to compare the impression on petitioner's wrist to the expansion band of the watch they found in Miss DiCenzo's apartment. R. 57. Petitioner denied being at the Royal Park Apartments that day, and stated that he had driven the Maverick to Durham for a 9:00 a.m. job interview at Bronson's Tire Company. The police did not telephone or interview any witnesses who could have corroborated

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7/ This car is referred to as a "61 Maverick" by Detective Blackwood at the evidentiary hearing, R. 48, but he describes it as a "1971 Maverick" on direct examination. R. 52. This same discrepancy occurs in the transcript. Cf. Transcript, State of North Carolina v. Tommy Noell, Orange County Superior Court, No. 73-Cr-4142 (August 2, 1973) at p. 192, with id., at 200. Petitioner's mother, the owner of the car, testified that it was a 1971 model. R. 65.

petitioner's alibi until some time later.[8/] Detective Blackwood testified that he did not secure a warrant to seize a red shirt with blue horizontal stripes which he saw hanging on a clothesline near petitioner's trailer, ibid., and that he did not check the fingernails of the prosecuting witness or petitioner's outer garments, underclothes, fingernails or other body parts for evidence. R. 52, 53. The police did not secure a warrant and search the 1971 Maverick petitioner had been driving on May 23, although they saw this car parked near petitioner's trailer. R. 53.

Petitioner testified that on the morning of May 23, 1973, he left his home at 7:30 a.m., drove his mother to work at Memorial Hospital, delivered three children to a nursery school, repaired a flat tire on the car, and then drove to Durham, North Carolina, twelve miles from Chapel Hill, for a 9:00 a.m. job interview at the Bronson Tire Company. At about 9:15 a.m., he had an interview with one Bill Austin there, and then proceeded back to his trailer in Chatham County, arriving at approximately 9:45 a.m. Petitioner stated that the job interview had been set the previous afternoon, May 22, by a man named Locke at the Snelling and Snelling Employment Service in Chapel Hill. On cross examination, the State introduced an appointment card written by this agency for an interview at

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8/ See pp. 37- 40, infra.

Bronson's for petitioner at 9:00 a.m., May 22. Mr. Bill Austin, the manager of Bronson's testified that he had seen petitioner for a job interview between 9:00 a.m. and 10:00 a.m., but that he could not remember whether this meeting had occurred on May 22 or May 23. R. 67, 68. Petitioner also stated that he had worn maroon pants and a pinkish-red shirt on both May 22 and May 23 because all of his other clothes were packed. He admitted having worked as a vacuum cleaner salesman in October, 1972.

Petitioner's mother, Mrs. Loulabelle Noell, testified that he had dropped her off at her job in Chapel Hill at 7:50 a.m., May 23, and that he had been wearing maroon pants and a flowered shirt. A witness testified that petitioner had brought three children to the Chapel Hill Cooperative Child Care Center on May 23, sometime after 7:30 a.m. Petitioner's wife, Barbara Noell, testified that petitioner had helped her move into a new trailer all morning May 22. She also stated that he left home at about 7:30 a.m., May 23, and had returned about 9:30, and that he was wearing a pair of burgundy slacks and a purple, yellow, and white shirt on both May 22 and May 23.

Petitioner returned to the stand to testify that he recalled visiting the Snelling and Snelling Employment Service in the early morning of May 22 as well as in the afternoon. Mr. Roy Locke then testified for the State in rebuttal that he was an employment counselor at Snelling and Snelling and that he had seen petitioner who was wearing a "red tank shirt," R. 74, at

8:00 a.m., May 22. He said that on the previous day, May 21, he had set up an interview for petitioner at 9:00 a.m., May 22, at Bronson's Tire Company. This witness testified that he made no change in the interview time, but that he did not know when the petitioner went for the interview.

During the selection of the jury at petitioner's trial, the State examined the veniremen extensively regarding their attitudes toward capital punishment. Over petitioner's objection, ten veniremen were excluded for cause on account of their death scruples.[9/] The trial court denied petitioner's challenge for cause to a white veniremen who stated that she had feelings "against" interracial marriage which "probably could" affect her consideration of the testimony in the case, R. 19, and to a white veniremen who said he was "not sure" he could vote to acquit if he had a reasonable doubt about petitioner's guilt unless that doubt was "strong enough," R. 24. Petitioner was forced to use peremptory challenges to excuse these veniremen, and by the end of voir dire had exhausted all of his peremptories. Six of the forty-seven veniremen examined for the selection of petitioner's jury were black; three[10/] were excluded by the State for cause on account of their acquaintance with petitioner, one[11/] was excluded for cause on account of his scruples against capital punishment, and the remaining two were excluded peremptorily by the State.[12/]

9/ Veniremen Wagner, R. 19-20; Rogers, R. 21; Tony, R. 22; Miller, R. 22; Snipes, R. 23-24; Dennis, R. 23-24; Beaver, R. 27-28; Whitted, R. 29-30; Pennell, R. 30-31; Parsell, R. 31.

10/ Veniremen Henry Alston, R. 15-16; Katherine Alston, R. 17-18; Stone, R. 16-17.

11/ Veniremen Whitted, R. 29-30.

12/ Veniremen Daye, R. 18; McAdoo, R. 26-27.

The State presented testimony from North Carolina Memorial Hospital emergency room nurse Mary Ford that Miss DiCenzo had been given a "rape examination" on the morning of May 23 and that various other tests had been conducted, but the results of the examination and tests were not introduced. R. 42-44. Petitioner's wife testified in support of his alibi, and stated that she married petitioner on March 17, 1973. R. 68. On cross examination, she testified, in response to a question by the Solicitor, that her child was due on September 30. R. 72.

At the conclusion of the evidence, the trial judge charged the jury that it could either find petitioner not guilty or guilty of rape as charged. The jury returned a verdict of guilty, and the court thereupon sentenced petitioner to die.

On February 25, 1974, the Supreme Court of North Carolina, with three Justices dissenting in regard to the death penalty, affirmed petitioner's conviction and death sentence. On March 4, 1974, Chief Justice William A. Bobbitt of the North Carolina Supreme Court stayed execution of the judgment in order to allow a petition for writ of certiorari to be filed in this Court. On May 16, 1974, Mr. Chief Justice Burger granted an extension of time until July 6, 1974 in which to file a petition for certiorari.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. Petitioner's Grouping of Exceptions and Assignments of Error (R. 120-126) in the Record on Appeal in the North Carolina Supreme Court assigned as error the death sentence in this case on the ground that:

> The defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States and under Article I, Section 27 of the Constitution of North Carolina were violated:
>
> 1. By the imposition of the death penalty sentence upon defendant, which penalty for rape is cruel and unusual punishment within the meaning of the said constitutional provisions.

Assignment of Error XXIV, R. 126. In his brief in the North Carolina Supreme Court, petitioner contended that, "The Death Sentence Imposed Upon Appellant Is Legally Unauthorized and Constitutes Cruel and Unusual Punishment Prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States." Brief of Appellant at 65-141. The Court rejected this contention: "The death sentence was, therefore, not only proper but was the only one that the court below could impose." 202 S.E.2d at 669-670 (App. A at 20a-21a).

II. Petitioner objected to the exclusion for cause of veniremen on the basis of their conscientious scruples against capital punishment on the basis that it denied him a "representative jury" R. 22, and he excepted to the challenge of each of the ten veniremen who were excluded for cause on these grounds. Exceptions 7, 9, 10, 11, 12 (an exception to the exclusion of two veniremen), 16, 17, 18, 19. Petitioner assigned these exclusions as error on the following grounds:

> The defendant's rights as protected by the Sixth and Fourteenth Amendments to the Constitution of the United States, and particularly his rights to due process and the equal protection of the laws as guaranteed thereunder, were violated by the exclusion of jurors who opposed capital punishment in that:
>
> 1. Defendant's rights to due process and equal protection of the laws as protected under the Fourteenth Amendment to the United States Constitution were violated when potential jurors with scruples against capital punishment were excused for cause in violation of the principles stated in WITHERSPOON v ILLINOIS.
>
> 2. Defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution to a fair, impartial and representative jury were violated by the exclusion of those prospective jurors with scruples against the imposition of capital punishment;
>
> 3. Equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, Section 19 of the North Carolina Constitution was denied when that class comprised of those with scruples against capital punishment was prevented from sitting as jury members in this case.
>
> 4. Defendant's constitutional rights as protected by the Sixth and Fourteenth Amendments to the United States Constitution were denied in that barring those with scruples against capital punishment prevented defendant's trial by a jury from the district in which the crime was committed.

Assignment of Error IV, R. 121-122. Petitioner's brief presented these contentions. Brief of Appellant at 25-27. The Court rejected these arguments: "Under Witherspoon, . . . we hold that these . . . jurors were properly excluded for cause." 202 S.E.2d at 761 (App. A at 12a).

III. Petitioner's Grouping of Exceptions and Assignments of Error in the Record on Appeal in the North Carolina Supreme Court assigned as error the Solicitor's suggesting through examination of a prosecution witness that evidence, never in fact produced

and not subject to cross examination, bolstered the prosecution's case (Assignment of Error IX, X, XI, R. 123) and the Solicitor's eliciting from petitioner's wife the fact that their child had been conceived prior to their marriage (Assignment of Error XVII, R. 124). These contentions were argued in petitioner's brief in the North Carolina Supreme Court. Appellant's Brief at 28-35, 64-65. The Court rejected both of these arguments, 202 S.E.2d at 763, 769 (App. A at 14a, 19a).

IV. Petitioner's Grouping of Exceptions and Assignments of Error in the Record on Appeal in the North Carolina Supreme Court assigned as error the following:

> Defendant, an indigent for whom counsel was appointed a week after his arrest, was denied rights guaranteed under the Fourteenth Amendment to the Constitution of the United States by the failure of the arresting officers to carry out immediate investigative steps requested by defendant, which steps themselves would have developed overwhelming evidence of defendant's innocence, and these failures led to the disappearance, destruction and unavailability at trial of evidence crucial to defendant's defense.

Assignment of Error XIII, R. 124. This contention was argued in petitioner's brief in the North Carolina Supreme Court, Appellant's Brief at 37-47, and it was rejected by the Court: "Police officers are under no duty to take any particular course of action when investigating a crime." 202 S.E.2d at 765 (App. A at 16a).

V. Petitioner's Grouping of Exceptions and Assignments of Error in the Record on Appeal in the North Carolina Supreme Court assigned as error the trial court's refusal to exclude for cause a white venireman who expressed "feelings against interracial marriage" (Assignment of Error III, R. 121), and the trial

court's refusal to exclude for cause a white venireman who stated he was "not sure" whether he would vote to acquit if he had only a reasonable doubt of petitioner's guilt (Assignment of Error VIII, R. 123). Petitioner also claimed that:

> The trial court erred in excusing for cause three jurors who indicated they knew and would have some bias toward the defendant when it did not first instruct those jurors that it would be their duty to convict if the State resolved all reasonable doubts about his innocence and when it did not seek to ascertain whether the jurors' bias was based on defendant's good reputation in the community before it excused them.

Assignment of Error I, R. 120, and:

> The trial court erred in permitting the violation of defendant's rights to trial by a jury from which jurors have not been excluded because of their race when it permitted the State peremptorily to challenge the only black juror who did not know defendant and to challenge for cause all other black prospective jurors who indicated an acquaintance with defendant, all to the detriment of and in violation of defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution and under Article I, Sections 24 and 26 of the North Carolina Constitution.

Assignment of Error II, R. 121. These contentions were argued in petitioner's brief in the North Carolina Supreme Court, Appellant's Brief at 17-25, 27-28, and rejected by the Court. 202 S.E.2d at 757-760, 761-762 (App. A. at 8a-11a, 12a-13a).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF RAPE UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In order to avoid burdening the Court with lengthy and repetitious matter, petitioner adopts the "Reasons for Granting the Writ" section of the Petition for Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73- (O.T. 1973, filed June 11, 1974), at pp. 11-51 and each of the issues set forth there:

(A) Whether the decision of the North Carolina Supreme Court reinstating the death penalty in that State following Furman v. Georgia, 408 U.S. 238 (1972), is an impermissible evasion of the Furman holding;

(B) Whether such a reinstatement of the death penalty by judicial decision violates the Eighth and Fourteenth Amendment commands of lawfulness in criminal punishments;

(C) Whether the perpetuation of arbitrary sentencing discretion in North Carolina's administration of the death penalty following Furman violates the constitutional rule of that case;

(D) Whether the death penalty is so inconsistent with contemporary standards of decency as to violate the Eighth and Fourteenth Amendments.

The remaining Eighth Amendment issue presented by this case is whether the death penalty is an excessive, disproportionate and aberrational punishment for the crime of rape when that crime results in no considerable bodily injury. The question is one on which a conflict apparently exists between the North Carolina Supreme Court and the cognizant federal Court of Appeals. See Ralph v. Warden, 438 F.2d 786, 793 (4th Cir. 1970) cert. denied 408 U.S. 942 (1972).

Restraints upon excessive punishment run deep in the Anglo-American tradition,[13/] and their expression in the Eighth Amendment was a principal ground of decision in Weems v. United States, 217 U.S. 349 (1910). Although the punishment involved in Weems was peculiar and outlandish in nature, condemnation of it rests expressly upon the oppressiveness of that punishment for the crime of falsifying public records, and its consequent lack of "adaptation of punishment to the degree of crime." 217 U.S. at 365. See also O'Neil v. Vermont, 144 U.S. 323, 337, 339-340 (1892)(Justice Field dissenting);[14/] Hart v. Coiner, 483

13/ Magna Carta contains three chapters requiring that amercements be proportioned to the measure of magnitude of offenses. MAGNA CARTA, ch. 20-22 (1215), printed in ADAMS & STEPHENS, SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY (1926)42,45.

14/ Justices Harlan and Brewer agreed with Justice Field that O'Neil's long jail sentence was excessive "in view of the character of the offences committed," 217 U.S. at 366, 371,which were liquor law violations. The majority of the Court declined to reach the merits of the question because it was not properly presented and because the Eighth Amendment was not then viewed as a restraint upon the States. 217 U.S. at 331-332.

F.2d 136, 139 (4th Cir. 1973), cert. denied, ____ U.S. ____, 39 L.Ed.2d 881 (1974)

This constitutional requirement of adaptation is not Procrustean: it does not command a commensurability of crime and punishment that neither legislatures nor courts, nor the sciences of penology, are sufficiently informed to calibrate. See Packer, Making the Punishment Fit the Crime, 77 HARV. L. REV. 1071, 1078-1080 (1964). However, to would ignore the entire experience of our criminal law system to deny that the grading of offenses by their seriousness is endemic to it; and, in this context, the Eighth Amendment's prohibition of cruel and unusual punishments must impose some restriction upon the power of a State to proceed aberrantly in affixing maximum penalties to grades of crime.

In assessing the death penalty for rape as that penalty was reinstituted in North Carolina by State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973), this Court is not left without compelling benchmarks. For the fact is that such a punishment today is aberrant in the farthest extreme. Rape is everywhere regarded as a serious offense, but it is punished by death in only four countries outside the United States: Taiwan, Zambia, Malawi, and the Republic of South Africa.[15/] Prior to the

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15/ UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968), pp. 40, 86. This survey was based upon responses received from governments or "national [United Nations] correspondents" in 109 countries and colonies. Ibid. at 4-5.

Furman decision, sixteen American States and the federal government authorized a discretionary death penalty for rape.[16] However, as of June 1, 1974, only Georgia,[17] North Carolina,[18] and perhaps Louisiana[19] impose the death penalty for the rape

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16/ 18 U.S.C. §2031 (1971); Ala. Code, tit. 14 §395 (Recomp. Vol. 1958); Ark. Stat. Ann. §41-3403 (Supp. 1969); Fla. Stat. Ann. §794.01 (1965); Ga. Code Ann. §26-2001 (1969); Ky. Rev. Stat. Ann. §435.090 (1969); La. Rev. Stat. Ann. §14:42 (1950) and La. Code of Crim. Proc., Art. 817 (1971); Md. Code Ann., art 27, §461 (Repl. vol. 1967); Miss Code Ann. §2358 (Recomp. Vol. 1956); Vernon's Ann. Mo. Stat. §559.260 (1953); Nev. Stat. §§200.363, 200.400 (1968); N.C. Gen. Stat. §14-21 (Repl. Vol. 1969); Okla. Stat. Ann., tit. 21, §1115 (Supp. 1970); S.C. Code Ann. §16-72 (1962); Tenn. Code Ann. §39-3702 (1955); Vernon's Tex. Pen. Code Ann., art. 1189 (1961); Va. Code Ann. §18.1-44 (Repl. Vol. 1960).

17/ No. 74, Ga. 1973 Sess. Laws, at 164-165, amending Ga. Code §27-2534.1.

18/ North Carolina's new capital punishment legislation imposes the death penalty for "first degree rape," defined as rape accomplished through use of a deadly weapon or attended by "serious bodily injury" or a rape where the defendant is over sixteen years of age and the victim is "a virtuous female child under the age of twelve years." N.C. Gen. Stat. §14-21, as amended by Sec. 2, Chap. 1201, 1973 N.C. Sess. Laws.

19/ State v. Selman, La. Sup. Ct. No. 54376 (June 10, 1974) (the time to seek rehearing has not expired as of the date of the filing of this petition for certiorari. See La. Sup. Ct. Rule IX, § 1).

of an adult woman, while two other States make certain rapes of children capital.[20] Eleven of the sixteen States that punished rape with death before Furman have now abandoned the death penalty entirely for this crime.[21] And the North Carolina General Assembly itself, acting after the affirmance of petitioner's death sentence, has ceased to use death to punish the wide range of rape offenses made capital by the State's Supreme Court in Waddell.

20/ The new Florida statute imposes the death penalty for rape if the victim is under 11 years old and the defendant is 17 or older. Fla. Stat. §921.141 (1972). The new Tennessee statute imposes the death penalty for rape, if the victim is under twelve years of age. Tenn. Code §39-2402, as amended by Pub. Chap. 462, Tenn. Laws 1974.

21/ Arkansas, Kentucky, Mississippi, Nevada, Oklahoma, and Texas have enacted new death penalty statutes that do not make rape a capital crime. Alabama, Missouri, Maryland, South Carolina, and Virginia have not enacted any death penalty legislation after Furman.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF TEN VENIREMEN ON THE GROUNDS OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The record below presents important issues concerning the constitutionality of excluding persons who oppose capital punishment from service on trial juries in capital cases tried under a purportedly "mandatory" death-sentencing procedure. Notwithstanding Witherspoon v. Illinois, 391 U.S. 510 (1968), the Supreme Court of North Carolina here upheld the exclusion of ten veniremen on the ground that "each of these prospective jurors, before hearing any of the evidence, had already made up his mind that he would not return a verdict in this rape case pursuant to which the defendant might lawfully be executed, whatever the evidence might be." 202 S.E.2d at 761 (App. A at 12a). That holding presents issues of general significance, which should be determined by this Court.

A. The Test of Exclusion Applied by The Court Below Did Not Meet the Minimum Standards Required by The Constitution As Construed in Witherspoon v. Illinois, 391 U.S. 510 (1968).

A number of questions concerning the applicability of Witherspoon are presented by this case, for that decision held that "[i]f the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than [that outlined in Witherspoon] . . . , the death sentence cannot be carried out." 391 U.S. at 522 n. 21 (emphasis added). See also Maxwell v. Bishop, 398 U.S. 262, 266 (1969); Boulden v. Holman, 394 U.S. 478, 482 (1968).

First, the exclusion of venireman Rogers was in flat

violation of the Witherspoon requirement that a venireman may not be excluded for "voic[ing] general objections to the death penalty or express[ing] conscientious or religious scruples against its infliction." Witherspoon v. Illinois, supra, at 522. This venireman was excluded on the basis of the following examination:

> SOLICITOR: And Mrs. Rogers, let me ask you the same question, that I have been asking. Would it be impossible for you to bring in a verdict requiring the imposition of the death penalty, under any circumstances, no matter-- even though the State proved to you the defendant's guilt beyond a reasonable doubt?
> JUROR ROGERS: I do not believe in capital punishment.
> MR. PIERCE: Let me ask you this question, again, with your answer in mind, please. Would it be impossible to bring in a verdict that required the imposition of the death penalty, no matter what the State showed you, by way of the evidence?
> JUROR ROGERS: I think so.
> MR. PIERCE: We challenge her for cause.
> COURT: The challenge is sustained.
> MR. EPTING: Objection.
> COURT: The objection is overruled.

R. 21. If Witherspoon has any application to capital trials in which the jury purportedly does not decide the issue of punishment the trial court's exclusionof this juror was reversible error,[22/]

22/ The Court of Appeals for the Fifth Circuit has recognized that the number of veniremen wrongfully excluded on account of scruples against the death penalty is irrelevant:

> The magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society; indeed, many agree on moral or religious grounds that it is incomprehensible that an advanced society such as ours should yet engage in such practice. Given the weightiness of the subject involved it really does not follow that the improper exclusion of a relatively small number of the total veniremen examined does not prejudice the defendant's rights to an impartial cross-section of the community. Where, as here, unanimity of decision is required to impose the death sentence, the stark reality is that one improperly excluded juror may mean the difference between life or death for a defendant. Although a defendant certainly has no assurance that a properly empaneled jury will not impose the death penalty, it seems to us that in light of the vast difference in treatment which may result from the improper exclusion of a single venireman, even that degree of error is prejudicial to the rights of a defendant in a capital case.

Second. This Court should determine whether scruples against the imposition of capital punishment in all circumstances can be made "unmistakably clear," as required by Witherspoon, 391 U.S. at 522, n. 21, in the absence of an instruction by the trial court that it is the civic duty of each veniremen to sit as a juror if he possibly can. As the Court declared in Boulden v. Holman, 394 U.S. 478, 483-484 (1969): "[I]t is entirely possible that a person who has 'a fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." A veniremen must be instructed that the law requires him to "subordinate his personal views to what he . . . . [perceives] to be his duty to abide by his oath as a juror and to obey the law of the State," Witherspoon v. Illinois, supra, at 514-515 n. 7. Although a number of the excluded veniremen here stated that they would "automatically" vote against a verdict which entailed the imposition of a death sentence, none of them was given any instruction on their duty to subordinate their beliefs to the law of North Carolina that would be given them by the trial court.

Third, the Court should decide whether the voir dire here was in some cases simply too brief to determine with "unmistakable" certainty, Witherspoon v. Illinois, supra, at 522 n. 21,

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22/ cont'd.

Marion v. Beto, 434 F.2d 29, 32 (5th Cir. 1970). This Court has reversed convictions when only three veniremen were wrongfully excluded, Segura v. Patterson, 403 U.S. 946 (1971), rev'g, 402 F.2d 246 (10th Cir. 1968); Labatto v. Massachusetts, 403 U.S. 947 (1971), rev'g 254 N.E.2d 415 (1969); and a number of other courts have held that the wrongful exclusion of a single veniremen was reversible error. Woodards v. Maxwell, 303 F. Supp. 690 (S.D. Ohio 1969); People v. Schader, 80 Cal. Rptr. 1, 457 P.2d 841 (Sup. Ct. 1969); In re Hillery, 79 Cal. Rptr. 773, 457 P.2d 656 (Sup. Ct. 1969). In the instant case, of course, nine other veniremen were excluded.

that a venireman was properly excluded. For quick and seemingly unequivocal answers to questions concerning the death penalty often do not reveal a venireman's true sentiments. Here the trial court never instructed the veniremen that they would have no role in sentencing, and the veniremen thus were left in the dark as to their exact role under the Waddell procedure. Had they understood that sentencing was not their responsibility, it is possible that they might have been able to serve. But the perfunctory voir dire examination did not pause to enlighten them:

> MR. PIERCE: Sir, if the State satisfied you of the defendant's guilt beyond a reasonable doubt, would it be impossible for you to bring in a verdict that resulted in the imposition of the death penalty?
> JUROR PARSELL: It would be impossible.
> MR. PIERCE: Impossible under any circumstances?
> JUROR PARSELL: Yes, sir.
> MR. PIERCE: Your Honor, the State would ask that he be excused for cause.
> COURT: The challenge for cause is sustained.
> MR. EPTING: Objection.
> COURT: The objection is overruled. Call another juror to the box.

R. 31.

> MR. PIERCE: Do you--well, let me ask you this question. Now, knowing that the defendant is charged in a bill of indictment with rape, which is a capital crime under our State law, would it be impossible for you to bring in a verdict which would require the imposition of the death penalty, even though the State proved to you by the evidence and beyond a reasonable doubt, that he is guilty?
> JUROR PENNELL: Yes, it would be impossible.
> COURT: You say it would be impossible?
> JUROR PENNELL: Yes.
> MR. PIERCE: The State would ask that she be excused for cause.
> COURT: The challenge for cause is sustained. Call another juror.
> MR. EPTING: Objection.
> COURT: Overruled.

R. 30-31.

> SOLICITOR: Now, let me address this question to each of the three of you. Knowing that this is a capital case, would you find it impossible under any circumstances, no matter what the State showed you, that is to say that even if the State showed you beyond a reasonable doubt

the guilt of the defendant in this case of the crime charged, would you find it impossible to bring in a verdict of guilty, under any circumstances, knowing - because of the capital penalty? . . .
Would you?
JUROR TONY: Yes, sir; I would.
MR. PIERCE: You would find it impossible to, under any circumstances, to bring in that verdict, Mrs. Tony?
JUROR TONY: Yes, I would.
MR. PIERCE: Your Honor, we would ask that Mrs. Tony be excused for cause.
COURT: The challenge for cause is sustained.
MR. EPTING: Note our continuing objection, on the basis of a representative jury.
COURT: The objection is overruled. Call in another juror.

R. 21-22.

Finally, the Court should decide whether Witherspoon allows the exclusion for cause of a juror who expresses conscientious scruples against the imposition of the death penalty for rape, in a case where the victim is not otherwise injured. For Venireman Dennis was excluded not because of inflexible and categorical conscientious scruples against the death penalty, but because -- in the exercise of obviously selective judgment -- he opposed that penalty for rape:

MR. PIERCE: Would you find it impossible to bring in such a verdict, that required the death penalty, under any circumstances? You can think about it.
JUROR SNIPES: It would be impossible; yes.
MR. PIERCE: How about you, Mr. Dennis?
JUROR DENNIS: I really don't know.

MR. PIERCE: Let me put the question to you the same way, would it be impossible, under any circumstances, even though the State had satisfied you beyond a reasonable doubt, from the evidence in the case, as to the defendant's guilt, to bring in a verdict which resulted in the death penalty?
JUROR DENNIS: Well, for what this is, I'd have to say yes.
MR. PIERCE: In a rape case, you couldn't do it?
JUROR DENNIS: Right.
MR. PIERCE: Your Honor, the State would ask that these two gentlemen be excused for cause.
MR. EPTING: The defendant would like to have Mr. Dennis examined somewhat further, as to his objection of the death penalty. I believe he understood, unless in this type of case; is that right, Mr. Dennis?

JUROR DENNIS: Right.
COURT: The challenge for cause is sustained as to each one of the two, and you may stand down. Call two more.

R. 23-24.

B. The Exclusion of Veniremen with Conscientious Scruples Against Capital Punishment Deprived Petitioner of His Sixth Amendment Right to A Representative Jury.

Witherspoon was decided only a few days after Duncan v. Louisiana, 391 U.S. 145 (1968); and the cases in which this Court has since applied Witherspoon have all been pre-Duncan cases (see DeStefano v. Woods, 392 U.S. 631 (1968))or cases in which no Sixth Amendment contention was made against death qualification. See Boulden v. Holman, 394 U.S. 478 (1968); Maxwell v. Bishop, 398 U.S. 262 (1970); and the twenty-three cases reversed on authority of Witherspoon in 403 U.S. at 946-948 (1971). At the time Witherspoon was tried, the right to jury trial was governed only by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court had recognized the rights of racial minority defendants to a jury from which members of their minority group were not excluded, see Smith v. Texas, 311 U.S. 128 (1940); Hernandez v. Texas, 347 U.S. 475 (1954), but it had not yet pronounced a general right to have a criminal jury selected from a panel representative of the populace.

The Sixth Amendment, however, entitles a defendant to this kind of jury. In Carter v. Greene County Jury Comm'n., 396 U.S. 320, 330 (1970), the Court held that such a requirement was imposed upon the States by Duncan, stating that the "very idea of a jury" was that of a "'body truly representative of the community'" (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)) and that jury lists must "'reasonably reflect a cross-section of the population,'" 396 U.S. at 332 (quoting Brown v. Allen, 344 U.S. 443, 474 (1953)).

As the Court has clarified the nature of the "jury" guaranteed in state-court proceedings by the Sixth Amendment, the importance of the cross-section requirement has become increasingly highlighted, and the permissibility of death qualification has become increasingly suspect. Williams v. Florida, 399 U.S. 78 (1970) held that a jury of twelve was not an essential part of the Sixth Amendment right, since the key function of the jury was to provide a group representative of the community which would prevent Government oppression of criminal defendants. "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." 399 U.S. at 100. The Sixth Amendment required only that the jury be large enough "to provide a fair possibility for obtaining a representative cross-section of the community . . ."[27] Ibid. In Apodaca v. Oregon, 406 U.S. 404, 410 (1972), the Court similarly ruled that the Sixth Amendment did not require state juries to reach a unanimous verdict, because the jury's common sense judgment could still be rendered without unanimity "as long as it consists of a group of laymen representative of a cross section of the community."

The principle that no identifiable group may be systematically excluded from jury panels is not limited to cases involving race: see White v. Crook, 251 F. Supp. 401, 408-409 (M.D. Ala. 1966)(exclusion of women); Labat v. Bennett, 365 F.2d 698 (5th. Cir. 1966), cert. denied, 386 U.S. 991 (1967)(exclusion of wage

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27/ The Court remarked the fact that in capital cases, no State provided for less than twelve jurors; it concluded that in death cases, this fact "suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." 399 U.S. at 103.

earners); State v. Schowgurow, 240 Md. 121, 213 A.2d 475 (1965) (exclusion of agnostics and atheists).

> "Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."

Hernandez v. Texas, 347 U.S. 475, 478 (1954). As the Court reiterated in Ausdaca v. Oregon, supra, at 413, the Sixth Amendment forbids "systematic exclusion of identifiable segments of the community from jury panels," and all such groups have "the right to participate in the overall legal processes by which criminal guilt and innocence are determined."

The Court also recognized in Witherspoon that jurors with scruples against the imposition of the death penalty form a coherent and sizeable group in most communities from which juries are selected. It is unclear how large this class is, but it is clearly quite substantial. In Witherspoon, the Court took judicial notice of a 1967 poll in the International Review on Public Opinion[24/] and concluded that "less than half" of the people in the United States "believe in the death penalty." 391 U.S. at 520. A 1969 Gallup poll showed that 40% of those interviewed said they opposed imposition of the death penalty.[25/]

Since all jurors resolutely opposed to the death penalty were systematically excluded from petitioner's post-Duncan jury panel, the issue is presented here whether this wholesale,

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24/ Polls, International Review on Public Opinion, Vol. II, No. 3, at 84 (1967).

25/ Bronson, "On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen," 42 U. Col. L. Rev. 1, 1 n. 2 (1970).

categorical exclusion of a sizeable portion of potential jurors may be justified under the exacting standards of the Sixth Amendment as incorporated into the Fourteenth by Duncan. Admittedly, a defendant may not object under the Sixth Amendment to the exclusion for cause of veniremen who are related to him or who have a monetary interest in the outcome of his suit because of the danger that such veniremen, if selected as jurors, would bring to bear on the jury's deliberations attitudes inconsistent with their proper duty as jurors to determine the truth impartially. It is the rightful duty of the jury, however, to express community attitudes about punishment: "one of themost important functions any jury can perform . . . . is to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Witherspoon v. Illinois, supra, at 520 n. 15 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). The Supreme Court of North Carolina has apparently recognized this function even under the purportedly "mandatory" capital trial procedures instituted by State v. Waddell: no other explanation is possible for its decision in State v. Britt, N.C. Sup. Ct. No. 36 (Robeson)(May 15, 1974)[26/] that capital jurors should be informed that the wages of their verdict may be death, although no argument may be made to them concerning the propriety of the death penalty in the case before them. The Court should determine, therefore, whether a criminal defendant is entitled to a jury panel which reflects a fair cross section of community sentiment about the death penalty - a panel from which veniremen such as

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26/ This opinion is attached as Appendix D to Dillard v. North Carolina, No. 73- (O.T. 1973).

Veniremen Snipes and Wagner cannot be excluded for cause.[27]

27/ [MR. PIERCE] Mr. Snipes, let me go ahead and get to this question. Let me ask you, would . . . you find it impossible, under any circumstances, to bring in a verdict which resulted in the imposition of the death penalty, even though theState satisfied you beyond a reasonable doubt of the defendant's guilt, from the evidence in this case?

You wouldn't have any trouble, Mr. Snipes?

JUROR SNIPES: I wouldn't bring in that kind of a verdict.

MR. PIERCE: Would you find it impossible to bring in such a verdict, that required the death penalty, under any circumstances? You can think about it.

JUROR SNIPES: It would be impossible; yes.

R. 23.

MR. PIERCE: Let me ask you this? Would it be impossible for you to bring in a verdict of guilty,knowing that that would be a verdict for--to bring in a verdict of guilty, even if the State satisfied you beyond a reasonable doubt that he is guilty?

JUROR WAGNER: Mean to be convicted, that he would be killed?

MR. PIERCE: Lady, sentenced to death.

JUROR WAGNER: He would be sentenced if I--we all agreed, we twelve agreed you had proved without a doubt he was guilty?

MR. PIERCE: Would it be impossible to bring in such a verdict, no matter what the State proves?

JUROR WAGNER: Yes.

R. 20.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER'S RIGHTS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES WERE VIOLATED BY THE CALCULATED MISCONDUCT OF THE PROSECUTOR IN: (a) IMPERMISSIBLY SUGGESTING THROUGH EXAMINATION OF A PROSECUTION WITNESS THAT EVIDENCE, NEVER IN FACT PRODUCED AND NOT SUBJECT TO CROSS EXAMINATION, BOLSTERED THE PROSECUTION'S CASE; AND (b) ELICITING FROM THE WHITE WIFE OF A BLACK DEFENDANT CHARGED WITH INTERRACIAL RAPE THE FACT THAT THE DEFENDANT'S CHILD HAD BEEN CONCEIVED PRIOR TO THEIR MARRIAGE.

Two separate episodes of gross misconduct in the petitioner's trial jeopardized its fairness upon the propriety of the conduct of prosecutorial officials. On one occasion, the prosecuting attorney deliberately elicited evidence which implied medical corroboration of the alleged rape. Specifically, he adduced testimoney that medical tests were performed on the complainant, although he offered no proof of their results. This breach was compounded by his deliberate suggestion in the form of a leading question put to his own witness, that a doctor who was capable of presenting the test results was "on vacation." The unmistakable implication of this series of "questions" and answers was that medical corroboration would have been presented but for the (unproved) unavailability of the doctor. [28]

28/ The examination in question proceeded as follows:

"Q. (MR. PIERCE) Now Miss Ford, Mrs. Ford, were any test conducted there at the hospital on Miss DiCenzo?
A. (MRS. FORD) Yes; there were.
Q. (MR. PIERCE) What were they, if you know of your own knowledge?
A. (MRS. FORD) There were slides done, surgical secretion, bubble secretion, which is normal procedure in any normal rape case.
MR. EPTING: Objection.
COURT: Sustained.
MR. EPTING: Move to strike.
COURT: The motion is allowed. Do not consider the last statement.
EXCEPTION NO. 23

On another occasion, the prosecutor asked petitioner's pregnant wife, who was testifying in his behalf, when the two had been married and when their child was due. The obvious implication of this series of questions was that the child had been conceived out of wedlock. In an interracial rape prosecution of a black defendant married to a white woman, this revelation was as damaging as it was indefensible, since its tendency was to show not only conduct offensive to local mores and race prejudice, but also the commission of s separate, unrelated crime.[29]

28/ (Cont'd)

Q. (MR. PIERCE) Were you present when a vaginal examination was done on this lady?
A. (MRS. FORD) Yes, I was.
Q. (MR. PIERCE) Since you're not a physician, don't undertake to give your opinion, but were you there during the entire time that the examination took place?
A. (MRS. FORD) Yes, sir; I was.
Q. (MR. PIERCE) Where is the doctor?
A. (MRS. FORD) At the present?
Q. (MR. PIERCE) Yes.
A. (MRS FORD) I don't know.
Q. (MR. PIERCE) Is he on vacation?
MR. EPTING: Objection.
COURT: Overruled, if she knows.
A. (MRS. FORD) I don't know.
COURT: Sustained. Don't consider that EXCEPTION NO. 24" (R. p. 43)

29/ § 14-184 of the General Statutes of North Carolina provides that: "If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misdemeanor: Provided, that the admissions or confessions of one shall not be received in evidence against the other. Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

A single act of illicit sexual intercourse is not, however, punishable by this statute. State v. Robinson, 9 N.C. App. 433, 176 S.E.2d 253 (1970).

This Court has insisted that a strict standard of fairness be observed by prosecuting officers, both federal and state. See Santobello v. New York, 404 U.S. 257 (1971); Giglio v. United States, 405 U.S. 150 (1972), and cases cited. "While [the prosecutor] . . . may strike hard blows, he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88 (1935).

The degree of prejudice required to render prosecutorial conduct cognizable as a due process violation takes account of the gravity of the prosecutor's violation of this standard:

> "The reason why the showing of prejudice required to bring down the balance in favor of a new trial will vary from case to case in that the pans contain weights and counterweights other than the interest in a perfect trial. Sometimes only a small showing of prejudice, or none, is demanded because that interest is reinforced by the necessity that 'The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach.' People v. Savvides, supra, and by the teaching of experience that mere admonitions are insufficient to prevent repetition of abuse. See Mapp v. Ohio, 367 U.S. 643, 650-653 (1961). In other cases, where the conduct of the trial has been less censurable, or not censurable at all, a greater showing of prejudice is demanded. . . . Kyle v. United States, 297 F.2d 507, at 514 (2d Cir. 1961).

The prosecutor's abuses here were plainly willful, and consequently of the gravest sort. Each was highly prejudicial both intrinsically and in its calculated design to defeat independent Fourteenth Amendment rights of a defendant on trial for hislife. For, the evidence relating to medical tests not only gave inadmissible support to the prosecutor's case, but also called upon

the supposedly unavailable doctor -- without proof of his unavailability, see Barber v. Page, 390 U.S. 719 (1968) -- in a way that evaded cross-examination, "a primary interest secured by [the Confrontation Clause]" Douglas v. Alabama, 380 U.S. 415, 418 (1965). And the deliberate presentation of inadmissible evidence regarding the pre-marital sexual relations of a black defendant and his white wife was not only unfair and inflammatory, but also violative of the State's obligations to maintain criminal prosecutions free from the taint of race prejudice, Ham v. South Carolina, 409 U.S. 524 (1973), and to assure that a defendant is tried on the facts charged and not on the issue of whether the defendant is "a bad man, likely to commit that sort of crime." Lovely v. United States, 169 F.2d 386, 388 (4th Cir. 1948). See Michelson v. United States, 335 U.S. 469, 475-476 (1948).[30/]

30/ "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, Greer v. United States, 245 US 559, 62 L ed 469, 38 S Ct. 209, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

IV. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER WAS DENIED THE FUNDAMENTAL FAIRNESS IN CRIMINAL PROSECUTIONS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHEN THE POLICE FAILED ADEQUATELY TO INVESTIGATE THE CRIME FOR WHICH PETITIONER WAS CONVICTED.

In Giles v. Maryland, 386 U.S. 66, 73-74 (1967), the Court considered "the broad questions whether the prosecution's constitutional duty to disclose extends to all evidence admissible and useful to the defense, and the degree of prejudice which must be shown to make necessary a new trial," although the decision in that case rested on narrower grounds. In Wardius v. Oregon, 412 U.S. 470, 474 (1973), the Court held that the Due Process Clause "speak[s] to the balance of forces between the accused and his accuser," and reversed a conviction on the ground that "fundamental fairness" required reciprocal discovery if a State compelled a criminal defendant to disclose alibi evidence in advance of trial. This petition presents the important question whether, in a case where an indigent defendant is charged with a capital crime and held in jail without appointed counsel, the State's qualified duty to disclose evidence useful to a defendant compels investigation of an alibi with reasonable dispatch and the use of certain other normal investigative techniques in order to preserve the defendant's right to a fair trial.

Petitioner was arrested on the day Miss DiCenzo was raped. When questioned at the police station, he repeatedly proclaimed his innocence and asserted that at the time of the rape he had been in Durham, North Carolina, at a job interview with an executive at a tire company. R. 52. At trial, petitioner's wife and mother testified in support of this alibi, R. 69-70, 65,

and various other witnesses gave testimony which inferentially supported it. R. 67. The crucial witness, Mr. Bill Austin, the person who interviewed petitioner, could not recall the date on which he talked to petitioner and testified that it was either the day of the rape or the day before. R. 67-68. The police, however, did not talk to Mr. Austin until he had forgotten what day petitioner was interviewed.[31] Furthermore, although the police testified that they could observe the impressions of a wrist watch band on petitioner's wrist (approximately eight hours after the rape, when the attacker lost his wrist watch in Miss DiCenzo's apartment), they made no effort to photograph these impressions and did not even compare the watch they found at the crime scene to the imprint on petitioner's arm. The police also neglected to seize a shirt resembling the one worn by the rapist which they saw hanging on petitioner's clothesline when they went to arrest him although a police witness described this shirt on direct examination. R. 45. No warrant was secured to search petitioner's car, although the State presented testimony that police officers had observed this car parked next to petitioner's trailer. R. 53. Finally, the police did not check petitioner's clothes or underclothes, and they did not examine

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31/ The record makes clear that the police did not immediately check petitioner's alibi, although they ultimately did go to Bronson's Tire Company. R. 53, 81, 100. The State's Brief in the Supreme Court of North Carolina states that the police did not check petitioner's alibi until "approximately seven days" after his arrest. State's Brief at 30, 32. Petitioner's Brief in that court states that the police did not attempt to corroborate his alibi until six days after they took him into custody. Appellant's Brief at 39.

his fingernails or pubic hair for possible evidence that he was the person who attacked Miss DiCenzo.

Although the police are normally free to adopt whatever investigative methods appear most effective, the failure of the police to check petitioner's alibi severely prejudiced him, since it resulted in his inability to secure what well could have been important exculpatory evidence. The Court should grant certiorari to determine whether the police investigation in this case, primarily the failure to check an alibi, when a capital defendant strongly proclaims his innocence and gives an exculpatory statement which could be confirmed by one phone call, constitutes a fundamentally unfair practice which results in the suppression of possible exculpatory evidence. Cf. Mooney v. Holohan, 294 U.S. 103 (1935); Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957); Brady v. Maryland, 373 U.S. 83 (1963); Miller v. Pate, 386 U.S. 1 (1967). A violation of Due Process has been found when a defendant, charged with driving under the influence of alcohol, is arrested and kept in jail without a lawyer if the police do not perform some kind of tests which will determine the presence of alcohol in the defendant's system; because of bodily metabolism, such crucial evidence will be lost without either prompt action by counsel for the defendant or by the authorities, and courts have recognized the fundamental unfairness of denying both such alternatives to a defendant. See In re Martin, 58 Cal.2d 509, 24 Cal. Rptr. 833, 374 P.2d 801 (1962); Winston v. Commonwealth, 188 Va. 386, 49 S.E.2d 611 (1948); City of Tacoma v. Heater, 67 Wash.2d 733, 409 P.2d 867 (1966). The claim that police investigatory tactics have deprived

a defendant of Due Process is, obviously, conditioned by the factual circumstances of an individual case. But when an indigent defendant charged with a capital offense insists that he was in a particular place talking to an easily identifiable and accessible person at the time of the crime, the "balance of forces between the accused and his accuser," Wardius v. Oregon, supra, at 474, requires a reasonable attempt on the part of the police to investigate this claim if counsel is not immediately appointed for petitioner. The legitimate interest of the State, after all, "is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). The State's nonfeasance denied petitioner "a fair determination of his guilt or innocence." Roberts v. Russell, 392 U.S. 293, 294 (1968).

V. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PROCESS OF SELECTING PETITIONER'S TRIAL JURY IN AN INTERRACIAL RAPE CASE DENIED PETITIONER'S RIGHTS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES WHEN: (a) THE TRIAL COURT DENIED PETITIONER'S CHALLENGE FOR CAUSE TO A WHITE VENIREMAN WHO EXPRESSED "FEELINGS AGAINST INTERRACIAL MARRIAGE" IN A CASE WHERE THE BLACK PETITIONER AND HIS WHITE WIFE BOTH TESTIFIED; (b) THE TRIAL COURT DENIED PETITIONER'S CHALLENGE FOR CAUSE TO A WHITE VENIREMAN WHO STATES HE WAS "NOT SURE" WHETHER HE WOULD VOTE TO ACQUIT IF HE HAD ONLY A REASONABLE DOUBT OF PETITIONER'S GUILT; AND (c) OTHERWISE ELIGIBLE BLACK VENIREMEN WERE SWEPT FROM THE JURY THROUGH THE INTERACTION OF PROSECUTORIAL CHALLENGES FOR CAUSE ON THE GROUND OF CONSCIENTIOUS SCRUPLES AGAINST CAPITAL PUNISHMENT AND THE PROSECUTOR'S EXERCISE OF HIS PEREMPTORY CHALLENGES.

This Court has noted in several contexts the particular concern of the Fourteenth Amendment against race discrimination in the jury selection process.[22/] In the prosecution of a black defendant for the alleged rape of a white victim, where the only available penalty is death, the importance of a jury selection

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22/ E.g., Peters v. Kiff, 407 U.S. 493 (1972). "[S]ince a principal purpose of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race," judges may not refuse to state criminal proceedings to allow relevant interrogation of jurors "upon the subject of racial prejudice." Ham v. South Carolina, 409 U.S. 524, at 525-26 (1973). Moreover, despite the normal rule that the defense and prosecution are permitted to exercise peremptory challenges "without a reason stated, without inquiry and without being subject to the court's control," Swain v. Alabama, 380 U.S. 202, at 220 (1965), a consistent and systematic exercise of peremptory challenges "to prevent any and all Negroes on petit jury venires from serving on the petit jury itself"would constitute "invidious discrimination for which the peremptory system is insufficient justification." Id. at 223.

process free from the taint of race discrimination is dramatically apparent.

Petitioner was tried by an all-white jury. Three black veniremen were excluded for cause because they knew petitioner and stated on voir dire that the acquaintance would affect their verdicts. One of the two remaining black veniremen was excluded for cause because of his opposition to the imposition of a death penalty.[33/] Like other veniremen who expressed objections to capital punishment, this gentleman was excluded for cause without examination as to his ability and willingness to put scruples aside in the performance of a civic

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33/ The examination of this juror was as follows:

> "MR. PIERCE: Let me go ahead and ask you this question, to start with and we might save some time. Would you find it impossible, under any circumstances, even if the State shows you by the evidence, and beyond a reasonable doubt, that the defendant Tommy Noell is guilty, would you find it impossible to bring in a verdict, under any circumstances, that required the death penalty?
> JUROR WHITTED: I believe I would.
> MR. PIERCE: What was that answer?
> JUROR WHITTED: I believe I'd be opposed to it.
> MR. PIERCE: You could not bring in such a verdict, under any circumstances?
> JUROR WHITTED: I'm afraid not.
>
> MR. PIERCE: Your Honor, the State would ask that this gentleman be excused for cause.
> COURT: Just a moment. I'm not sure that I understand that. Do I understand you to say that you could not, even though satisfied of the defendant's guilt, beyond a reasonable doubt, that you could not bring in a verdict that would result in the imposition of the death penalty?
> JUROR WHITTED: Yes, sir; I'm afraid I would be opposed to bring in the death penalty.
> COURT: Could you or could you not?
> JUROR WHITTED: I don't believe I could.
> COURT: All right, I'll sustain the challenge for cause. You may step down.
> MR. EPTING: Note our objection.
> COURT: The objection is overruled; call another juror.
> EXCEPTION NO. 17 R. 29-30

duty and to render a verdict in accordance with applicable law (see discussion, pp.23-32, supra). By stark contrast, a white juror who explicitly expressed a willingness to return a guilty verdict despite reasonable doubt as to petitioner's guilt was carefully informed of his duty under the law, and permitted to survive a challenge for cause despite the ambiguity of his subsequent responses.[34/]

34/ Examination of the prospective juror was as follows:

"MR. EPTING: Now, if there is one particular area in the case, that you're not sure of, and that you have a doubt of, that's a reasonable doubt about, but other than that area, you believe that the defendant may have been involved in the crime charged, what would be your verdict in such a case?

JUROR MORGAN: That wouldddepend.

MR. EPTING: If there was any reasonable doubt in your mind, regardless of the balance of the evidence in the case, you couldn't at at this time say that you would return a verdict of not guilty?

JUROR MORGAN: I'm not too sure.

MR. EPTING: Your Honor, we submit and ask that he be excused for cause.

COURT: The court instructs you, that under the law, that if you have a reasonable doubt about his guilt, it would be your duty to return a verdict of not guilty. Would you do so, or would you find him guilty, even though you had a reasonable doubt about his guilt?

JUROR MORGAN: If I had a reasonable doubt, I would not find him guilty, if it was strong enough.

COURT: I'm going to let you question him further. I want to be sure about this. Let me ask him a couple of other questions first. Would there be any hesitation to return a verdict of not guilty, if you had a reasonable doubt about his guilt, if you did have a reasonable doubt about his guilt?

JUROR MORGAN: Yes, sir.

COURT: Would you have any hesitation to do so?

JUROR MORGAN: No, sir.

COURT: I'm going to overrule the objection. You may examine him further. The challenge for cause is overruled for the time being." R. 24-25
(emphasis supplied)

Petitioner is a black man married to a white woman who was to testify in his behalf at trial. Nonetheless, a white potential juror who expressed feelings"against" interracial marriage which, by her own estimate, "probably could" have affected her consideration of testimony in petitioner's case was also permitted to survive a challenge for cause R. 18-19 .

The last black veniremen was excluded peremptorily after having stated that he had known petitioner "on and off for the last four or five years" R. 18 . Defense counsel's objection that this exercise of the State's peremptory challenge culminated a process whereby every black prospective juror had been excused was overruled R. 18 .

The trial judge's refusal to exclude a juror with an expressed inclination to convict despite the existence of a reasonable doubt as to petitioner's guilt would, standing alone, be questionable in view of this Court's clear holdings that the requirement of proof beyond a reasonable doubt is an essential due process safeguard. In re Winship, 397 U.S. 358 (1970); Ivan v. City of New York, 407 U.S. 203 (1972); Cool v. United States, 409 U.S. 100 (1972). The failure to excuse a juror who admitted that racial attitudes would probably have an effect on her deliberations is also independently questionable. Ham v. South Carolina, supra. These acts, taken together with the exclusion by peremptory challenge of the last of the black veniremen, following the exclusion for cause without proper prior inquiry of a black veniremen expressing scruples against capital punishment, raise the issue whether the jury selection process, viewed as a whole, "denied [petitioner] a trial in accord with traditional and fundamental standards of due process."

Chambers v. Mississippi, 410 U.S. 284, at 302 (1973), and whether "under the facts and circumstances of this case the rulings of the trial court deprived [petitioner] of a fair trial." Id. at p. 303.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-6876

TOMMY NOELL,

Petitioner,

-v.-

STATE OF NORTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of North Carolina

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

The purpose of this Supplemental Brief is to call the Court's attention to the enactment on June 24, 1975, by the North Carolina General Assembly of H.B. 953, c. 749 (1975 Sess.), effective immediately, a copy of which we append hereto.

RESPECTFULLY SUBMITTED,

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GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 1975
RATIFIED BILL

CHAPTER 749

HOUSE BILL 953

AN ACT RELATING TO PUNISHMENT FOR RAPES COMMITTED PRIOR TO THE EFFECTIVE DATE OF CHAPTER 1201, SESSION LAWS OF 1973.

The General Assembly of North Carolina enacts:

Section 1. The provisions of G.S. 14-21, as rewritten by Section 2 of Chapter 1201 of the Session Laws of 1973, shall apply in all trials hereafter conducted for rapes committed after January 18, 1973, and prior to April 8, 1974, the effective date of Chapter 1201, Session Laws of 1973.

Sec. 2. (a) In cases in which the defendant has been convicted of a rape committed after January 18, 1973, and prior to April 8, 1974, and the verdict and sentence of death are or have been sustained on appeal, the defendant may apply once to the judge presiding at the rape trial resulting in the sentence of death, or, if said judge is unavailable, to a resident superior court judge of the judicial district in which said rape trial was held, to determine whether the defendant could have been punished by death had the rape been committed by him after the ratification of Chapter 1201, Session Laws of 1973.

(b) Said judge shall review a certified transcript of the evidence presented at trial (or if such transcript is not available, the record on appeal), make such independent investigation as he deems necessary to determine the age of the defendant or of the rape victim, and hear arguments or accept

briefs in behalf of the defendant and the State.

(c) Thereupon, the judge shall determine the following question:

Is the evidence presented at the defendant's trial, plus additional evidence of the age of the defendant or the age of the rape victim, sufficient to submit the defendant's case to a jury on the charge of first degree rape as defined by G.S. 14-21(a), had the date of the rape been after April 8, 1974?

(d) If the question is answered in the affirmative, the defendant shall remain subject to the sentence of death. If the question is answered in the negative, the judge shall forthwith schedule a hearing for the presentation of evidence relative to resentencing the defendant; after the hearing, the sentence of death for rape previously imposed shall be vacated, and the defendant shall be resentenced as if he had been convicted of second degree rape for a rape committed after April 8, 1974.

(e) There shall be no right of appeal from the determination of the judge, but the Supreme Court of North Carolina may, upon petition for certiorari, allow review of said determination.

(f) In cases of resentencing, the defendant shall be allowed credit for time spent in custody awaiting the execution of the sentence of death.

Sec. 3. An indigent person under sentence of death for a rape committed after January 18, 1973, and before April 8, 1974, shall be entitled to counsel in making one application under this act for each such sentence of death, if he is otherwise entitled under Article 36 of Chapter 7A of the General

Statutes of North Carolina.

Sec. 4. This act shall become effective upon ratification.

In the General Assembly read three times and ratified, this the 24th day of June, 1975.

JAMES B. HUNT, JR.

James B. Hunt, Jr.

President of the Senate

JAMES C. GREEN, SR.

James C. Green, Sr.

Speaker of the House of Representatives

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CERTIFICATE OF SERVICE

I, James M. Nabrit, III, hereby certify that I am a member of the bar of the Supreme Court of the United States and that I have served copies of the Supplemental Brief for Petitioner in the above case on counsel for the respondent by depositing same in the United States mail, first class mail, postage prepaid, addressed as follows: Hon. Rufus L. Edmisten, Attorney General, North Carolina Department of Justice, Box 629, Raleigh, North Carolina 27602. All parties required to be served have been served. Done this 18 day of July, 1975.

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